UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

RALPH J. CATALDO,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 96-49-B-DMC***
	)	
MICHAEL ROBERTS, et al.,	***)***	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

The plaintiff, Ralph J. Cataldo, brings a motion pursuant to Fed. R. Civ. P. 60(b) for relief from the judgment entered in this action on February 26, 1997 on the ground that "a fraud was perpetrated upon the Court" by defendant Edward Reynolds. Motion for Relief of Judgment and Order under Fed. R. Civ. P. Rule 60(b) ("Motion") (Docket No. 97) at [1]. Finding that the court lacks jurisdiction to entertain this motion, I deny it.

The motion identifies only Rule 60(b), without further specification of any of the subsections of that section of the rule, as its basis. It asserts that defendant Reynolds submitted an affidavit, Docket No. 66, upon which this court relied "as its basis in ruling" in favor of the defendants on their motion for summary judgment in this action, Docket No. 86, that is demonstrated to have been false or incorrect by an article published in the *Bangor Daily News* on October 8, 1994, Motion at [1-2], a copy of which is attached to the motion. This is the only evidence of fraud submitted with the motion. The plaintiff also argues that the court failed to address 30-A M.R.S.A. § 851 in its decision

granting the motion for summary judgment. *Id*. at [3].[1]

Rule 60(b) provides several grounds upon which a court may relieve a party from a final judgment. The plaintiff's motion cannot be construed to allege the grounds listed in subsections (1), (4) or (5) of Rule 60(b) — mistake, inadvertence, surprise, excusable neglect, that the judgment is void, or that the judgment has been satisfied, released, or discharged. Nor can it be construed to allege grounds under Rule 60(b)(2), because the only evidence offered with the motion is a newspaper article published before this action was filed, which cannot be "newly discovered evidence." *Mitchell v. United States*, 141 F.3d 8, 18 (1st Cir. 1998) (motion under Rule 60(b)(2) requires proof, *inter alia*, that evidence could not have been discovered earlier by movant's due diligence). Therefore, the motion can only invoke Rule 60(b)(3), the most likely choice since it provides relief for fraud, misrepresentation or other misconduct of an adverse party, which appears to be the gravamen of the instant motion, or Rule 60(b)(6), which provides relief for "any other reason justifying relief from the operation of the judgment."

A motion brought pursuant to Rule 60(b)(1), (2) or (3) must be made "not more than one year after the judgment, order, or proceeding was entered or taken." This time limit is jurisdictional. *Brandon v. Chicago Bd. of Educ.*, 143 F.3d 293, 296 (7th Cir.), *cert. den.* 119 S.Ct. 374 (1998) (Rule 60(b)(1)); *Nevitt v. United States*, 886 F.2d 1187, 1188 (9th Cir. 1989) (Rule 60(b)(2)). The pendency of an appeal does not extend the one-year limit. *Simon v. Navon*, 116 F.3d 1, 3 (1st Cir. 1997). The judgment from which the plaintiff seeks relief in this motion was entered on February

[1] The plaintiff raises additional grounds for relief in a reply memorandum, Plaintiff Ralph Cataldo's Response to the Objection as Filed by the Penobscot County Sheriffs Department and Sheriff Edward Reynolds to plaintiffs motion for Relief ("Reply Memorandum") (Docket No. 99) at 1-4. Issues raised in this manner may not be considered by the court. *In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991).

26, 1997. This motion was filed on October 20, 1998. To the extent that the motion seeks relief under Rule 60(b)(2) or (3), therefore, this court lacks jurisdiction to entertain the motion, and it must be dismissed.[2]

A motion brought pursuant to Rule 60(b)(6) is not subject to the one-year deadline. However, the First Circuit has ruled that "perjury alone, absent allegation of involvement by an officer of the court" will not entitle a party to relief under this subsection of the rule. *Geo. P. Reintjes Co. v. Riley Stoker Corp.*, 71 F.3d 44, 49 (1st Cir. 1995). The allegations in the plaintiff's motion concerning defendant Edwards do not rise to a level that would entitle him to relief under Rule 60(b)(6) in this circuit.

Finally, the plaintiff's invocation of 30-A M.R.S.A. § 851 is unavailing. The plaintiff's objection to the defendant's motion for summary judgment does not mention that statute, Objection to Motion for Summary Judgment, etc. (Docket No. 68), so I could not have "failed to address" it. In addition, as set forth in my decision on the motion for summary judgment, the plaintiff's complaint was brought pursuant to 42 U.S.C. § 1983. Memorandum Decision on Motion for Summary Judgment of Defendants Edward Reynolds and Penobscot County Sheriff's Department

[2] The plaintiff has objected to the defendants' objection to this motion (Docket No. 98) on the grounds that it is untimely under this court's Local Rule 19(c). Reply Memorandum at 1. This court's Local Rule 7(b), which replaced the rule cited by the plaintiff on March 1, 1997, provides that a party opposing a motion shall be deemed to have waived objection unless the party files an objection within ten days after the filing of the motion. The defendants' objection was filed on November 9, 1998. In this case, the ten-day period would have expired on November 6, 1998, a Friday, were it not for the court's providing to counsel for the defendants, on the court's own motion, an extension of the deadline to November 9, 1998 due to the fact that the defendants' counsel had some months earlier left the law firm by which he was employed when he brought the motion for summary judgment in this case and upon which the plaintiff served a copy of the instant motion. Even if that were not the case, however, the fact that the defendants might have been deemed to have waived objection to the motion could not endow the court with the power to grant the motion when it lacks the jurisdiction to do so.

("Memorandum Decision") (Docket No. 86) at 1. A state statute does not provide the basis for a claim under section 1983. *Palmer v. Sanderson*, 9 F.3d 1433, 1438 (9th Cir. 1993) (state statute imposing vicarious liability on sheriff for conduct of deputies is inconsistent with laws of United States and prevents its application in a section 1983 action).

For the foregoing reasons, the plaintiff's motion for relief from judgment is **DENIED**.

Dated this 1st day of December, 1998.

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David M. Cohen
United States Magistrate Judge